2012 WL 5985634
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

Court of Appeal, First District, Division 2, California.

George MELC et al., Plaintiffs and Appellants,
v.
Patrick DOHERTY et al.,
Defendants and Respondents.

A134330
|
Filed November 30, 2012

(San Francisco City and County Super. Ct. No. CGC–10–505502)

Attorneys and Law Firms

George William Wolff, P.O. Box 26749, San Francisco, CA 94126–6749, for Plaintiffs and Appellants.

Scott Ariel Freedman, Zacks & Utrecht, 235 Montgomery Street—Suite 400, San Francisco, CA 94104, David Stephen Zalob, 1 Embarcadero Center—Suite 750, San Francisco, CA 94111, for Defendants and Respondents.

Opinion

Lambden, J.

***1** Appellants George Melc and Jane Melc, appeal from the trial court's judgment, entered after the court granted summary judgment in favor of respondents Patrick Doherty (Doherty), Doherty Construction, and "Doherty Construction & Doyle Development" (DC + DD), as well as from the court's award of attorneys' fees.

Appellants are residential property owners who sought, among other things, to rescind a 2007 construction contract they entered into with respondent Doherty Construction and Doyle Development (not a party to this appeal) and obtain restitution of $306,900, based on their contention that the 2007 construction contract was illegal and unenforceable for lack of proper licensure. Respondents argued below that they were entitled to summary judgment/adjudication, principally because appellants had previously released their claims pursuant to a prior settlement agreement with Doherty Construction and Doyle Development, after the latter had sued appellants for breach of the 2007 construction contract and enforcement of a mechanic's lien (mechanic's lien action).

Appellants argue numerous other reasons why we must reverse all of the trial court's rulings, and respondents argue numerous other reasons why we should affirm them. We need not address all of these arguments. We conclude that the trial court erred in granting summary judgment because respondents did not establish that there were no triable issues of material fact regarding licensure. Therefore, the trial court's rulings regarding appellants' first, second, and ninth causes of action are reversed.

Specifically, respondents did not establish that the settlement agreement released appellants' claims in light of express language limiting the scope of the release to "known claims." Appellants raised triable issues of material fact regarding whether their present licensure claims were "known" to them at the time. Also, the trial court's conclusion that appellants should have known about the lack of licensure because license information was readily obtainable as a matter of public record is not supported by law. Therefore, we reverse the trial court's judgment dismissing appellants' first, second, and ninth causes of action, as well as the court's award of attorneys' fees to respondents, and remand this matter for further proceedings.

We affirm the trial court's dismissal of appellants' third cause of action, for breach of contract. Appellants fail to establish that the trial court erred in ruling that this cause of action could not be maintained because appellants were not parties to the contract alleged to have been breached.

BACKGROUND

In 2007, appellants entered into a construction contact with respondent Doherty Construction and non-party Doyle Development, who represented themselves as "contractors." Certain work was performed, a lawsuit seeking payment for work was filed by Doherty Construction and Doyle Development and resolved via a settlement agreement in

December 2007, and additional work was done on the property, but not to appellants' satisfaction. Appellants brought in a second group of persons to engage in construction work, which also led to a dispute. Appellants then sued everyone.

Appellants' Complaint

***2** In November 2010, appellants filed suit for fraud, rescission and restitution, breach of contract, damages, and license revocation against numerous defendants, including respondents. Among these defendants were John Doyle and Doyle Development (Doyle defendants). Appellants stated their causes of actions in very confusing ways. For example, they identified a set of defendants in the captions of their first three causes of action that are a somewhat different set than those identified in the body of each, referred to an otherwise unidentified "Doughery" in the captions of the first two causes of action and not Doherty, and named as a party to the first three causes of action "DC + DD Contract," which is defined as the 2007 construction contract, not a person. Also, as we will discuss, in their third cause of action, appellants alleged breaches of a contract to which respondents were not a party.

Nonetheless, appellants brought four distinct claims against respondents. Their first cause of action was for rescission of the 2007 construction contract and restitution, and they named respondents Doherty and DC + DD in the body of the cause of action. Appellants alleged that they entered into the 2007 construction contract with DC + DD, acting as a general contractor, for the "performance of certain remodeling and improvement work" on appellants' property. Appellants alleged that respondents DC + DD, Doherty, Doyle, and "DC + DD Contract" (along with unnamed Does) violated various Business and Professions Code provisions in that a partnership or joint venture of "[DC + DD] and the partners thereto acted as a 'contractor' " in performing actual construction work on appellants' property, "but did not hold a valid partnership or joint venture or other contractors license," thereby violating various sections of the Business and Professions Code. Appellants further alleged that, pursuant to Business and Professions Code section 7031, subdivision (b),[1] they were entitled to rescind the 2007 construction contract and recover from Doherty and Doyle, as well as DC + DD, all sums paid to them from appellants. Appellants alleged to have paid "Doherty Construction + Doyle Development and DC + DD" a total of $306,900.

In their second cause of action, appellants sought restitution of certain other payments. They alleged in the body of the cause of action that DC + DD Contract, Doherty, Doyle, and DC + DD (along with unnamed Does) breached their contract with appellants and violated various Business and Professions Code provisions "in that they used subcontractors and other persons who were not properly licensed by the Contractors State License Board with the required specialty or other license to perform work on the [property], including it is believed Immaculate Construction, Christopher Frederick Richards, Joanne Campbell and Does 1 to 100." Appellants brought similar allegations against other defendants that are not a party to this appeal in this cause of action as well. Appellants sought, pursuant to section 7031, subdivision (b) to recover all amounts the named defendants received from appellants in payment of any construction work performed "by such unlicensed persons" on their property.

Appellants brought their third cause of action for breach of contract against respondents, among others. Appellants alleged several specific breaches of the "Creative Contract," an apparent reference to an alleged 2008 construction contract appellants entered into with defendants *other* than respondents and the Doyle defendants. Appellants further alleged that "[a]s a direct and proximate result of the breaches of the DC + DD CONTRACT," Doherty and DC + DD, among others, which breaches are *not* identified, appellants had suffered $500,000 in damages.

***3** In their ninth cause of action, appellants sought license revocation pursuant to section 7106 against respondents, among others, because of violations of various Business and Professions Code provisions.

Respondents answered the complaint, denying most of the allegations and asserting several affirmative defenses, including that appellants' causes of action against them were barred by the doctrines of estoppel and waiver.

Respondents' Motion for Summary Judgment

Subsequently, respondents moved for summary judgment or, in the alternative, summary adjudication, based on three grounds: that appellants had released the claims stated in the first, second, and ninth causes of action in the prior settlement agreement; that appellants' third cause of action was based upon breaches of a contract to which respondents

were not parties, and was time-barred because its gravamen was negligence; and that they had no relationships with the persons whose allegedly unlicensed work formed the basis for the second cause of action.

Respondents submitted a declaration from Doherty in support of their motion, in which he stated that he had continuously held a general contractor's license since 2003. He further stated that since 2004 he had done business as "Doherty Construction," a registered dba in various counties, including in San Francisco, that was listed with the Contractors State License Board under his individual license. However, Doherty also stated, "It is my understanding that neither Mr. Doyle nor Doyle Development has ever maintained a contractor's license."

Doherty made various other statements, including regarding the negotiation of the December 2007 settlement agreement. According to Doherty, "No mention was made at any time before, during or after our settlement discussions that the Melcs were concerned about my licensing status, that of John Doyle, or that of any companies or entities we may have been involved with. Had they inquired, my licensing status, as well as that of my company, Mr. Doyle, and his company, would have been the same as they are today."

In their opposition to respondents' motion, appellants presented several arguments, as well as an underlying factual theory that they assert in this appeal as well. That is, appellants contended that respondents had acted as a partnership or joint venture, DC + DD, a separate entity that respondents held out as a licensed construction contractor and which was required to be licensed, but which, unknown to appellants, was not. Among other things, appellants argued they were entitled to rescission of the 2007 construction contract because it was illegal and unenforceable under California law. Appellants further contended that the settlement agreement did not release this claim because it was limited to a release of "known claims," and they were not aware of the time of the lack of licensure, having relied on representations that DC + DD was licensed.

Appellants based their contentions on their interpretation of certain language in the 2007 construction contract, the complaint for the mechanic's lien action, and the settlement agreement, checks they had paid regarding construction work on their property and change orders issued, an agreement produced in discovery between Doherty and Doyle, and a declaration by one of the appellants, Jane Melc.

***4** Specifically, the 2007 construction contract contains a typed, centered letterhead with "Doherty Construction" on one side and "Doyle Development" on the other (with a separate address and telephone number below each name, as well as a contractor's license number for Doherty Construction), with a "+" between them. The contract repeatedly identifies "Doherty Construction" and "Doyle Development" as "the Contractors," and refers to them as such throughout, without making any distinctions between the entities. It states that "[t]he Contractors shall execute the entire work described in the Contract Documents ..."; that "[t]he Owners shall pay the Contractors in current funds for the Contractors performance of the Contract Sum of Two Hundred and Ninety Eight Thousand, Five Hundred and Twenty Five Dollars ($298,525.00)"; and indicates the "Contractors" would carry workman's compensation insurance and liability insurance. Beneath "Contractors" on the signature page are two lines, which contain signatures of Doherty and Doyle respectively.

The November 2007 complaint for the mechanic's lien action states that attorney Matthew A. Brennan was representing plaintiffs Doherty Construction and Doyle Development. The complaint refers to "plaintiffs' " roles as contractors and the money due them as a result of their construction work. For example, the first paragraph of the complaint states:

"Plaintiffs Doherty Construction and Doyle Development ('plaintiffs') are now, and were at all times hereinafter stated, contractors and builders doing business as general contracting, home remodeling, or other activity contributing to the work of improvement, in the County of San Francisco, State of California, and duly licensed as such contractors under the laws of the State of California at the times each of the acts hereinafter mentioned were performed." It further states that "plaintiffs agreed to perform demolition and construction work" on appellants' "property." The complaint is verified by Doherty and Doyle.

The breach of contract cause of action in the mechanic's lien complaint refers to money owed by appellants for work performed pursuant to the 2007 construction contract, and states that as a result of appellants' breaches, "plaintiffs" have been damaged approximately $100,000 for costs and delays and lost profits, resulting from the breach and stopping plaintiffs from completing the construction." In addition, the verified complaint alleges that "plaintiffs' verified notice and

claim of lien was duly recorded," and that it contained a statement of "plaintiffs' " demand.

The December 2007 settlement agreement states that it is between appellants "and DOHERTY CONSTRUCTION and DOYLE DEVELOPMENT (hereinafter referred to as 'Doherty')." It further states, "Doherty is a fully licensed contractor doing business in the State of California," and that appellants "entered into an agreement for certain construction work to be performed by Doherty on the [p]roperty." The agreement contains signatures on lines for Doherty and Doyle.

The settlement agreement provides for a payment to "Doherty" of $57,400, for "Doherty" to give an unconditional waiver and release, for completion of the remaining worked provided by the 2007 construction contract, for "Doherty" to provide a lien release upon receiving the last payment owed, and for dismissal of the mechanic's lien complaint with prejudice. As we will discuss, the settlement agreement also includes a comprehensive release of "known claims."

As for the declaration by Jane Melc, although it states it is by "George/Jane Melc," it is signed by Jane Melc (Jane) only. As with the complaint, the declaration is written in a very confusing manner, particularly in referring to the persons and entities with which appellants contracted and negotiated. While it appears that Jane intends to refer to DC + DD in a number of instances, she did not use the same name each time. Therefore, we use the actual language stated in the declaration in summarizing her statements.

***5** Jane stated that she was the owner of a residential property in San Francisco, which was home to her and her family in 2007. At that time, "we" (an apparent reference to both appellants) called a contractor found in the yellow pages and Doyle came to the property. Doyle later introduced appellants to Doherty, and Doyle and Doherty presented appellants with the 2007 construction contract. Neither Doyle nor Doherty presented appellants with any notice regarding a three-day right to cancel the contract.

Jane further stated that Doyle and Doherty said they were partners and would be doing the job together. They both worked on the project, with Doyle there most of the time and Doherty present occasionally. Jane observed construction work done by both men on almost a daily basis.

Then, according to Jane, on August 28, 2007, Doherty recorded a mechanic's lien on the property "due to a payment and other dispute we had regarding the quality of the work on our property." At the time, appellants were "attempting to obtain construction loan financing to complete further remodeling of the property." The mechanic's lien created a problem in getting that financing because, according to appellants' loan broker, the lien would have priority over any financing. The mechanic's lien action was filed in November 2007.

Jane further stated, "Neither my spouse nor I were knowledgeable in legal matters, and we assumed that the Doherty lien and lawsuit were valid and that, therefore, we needed to make some settlement with Messrs. Doherty and Doyle regarding removal of the mechanics lien so that we could get the additional construction loan and make the property livable, as we believed we had no alternative way to complete the construction on our partly demolished home, so we therefore entered into the Settlement Agreement." She also referred to the settlement agreement as a "Settlement Agreement/Construction Contract," and stated that appellants were never provided with a notice of their three-day right to cancel that agreement.

Jane further stated, "Neither my spouse and I nor our attorney investigated whether Doherty Construction & Doyle Development held a valid contractor's license, as we relied on their statements and that of their attorney that they were licensed. Our attorney did not appear to be familiar with construction matters and he said he was just must [*sic*] a general practice attorney." She also stated, "We did not understand until consulting with our attorney George Wolff a few months ago that the contractor Doherty Construction and/+ Doyle Development was required to but did not hold a contractor's license in California, and that we could cancel our agreement with it on that basis and on the basis that we were not notified of our 3 Day Right to Cancel as required by statute."

Jane also stated that after the settlement agreement was signed, "an additional $91,900.00 was paid to Messrs. Doherty and Doyle as and [*sic*] our lender for their past and future construction work." The construction work called for by the settlement agreement was mostly performed by Doyle with two workers other than Doherty, who was present occasionally. She also referred to two checks made out to "Doherty Construction" totaling over $82,400, which appear from the signature to have been endorsed by Doyle.

Jane continued, "After the work to be performed by Doherty Construction and Doyle Development under the Settlement Agreement was mostly complete we hired another contractor to perform additional work on the property. That contractor was required by the Department of Building Inspection to repair or replace certain work performed by Messrs. Doherty and Doyle, including the rear stairs, at additional costs to us."

***6** Finally, Jane referred to an accompanying exhibit, which she described as a "Notice of Cancellation or Rescission of all contracts which we served upon Doherty Construction, Doyle Development, and 'Doherty Construction and/+ Doyle Development' " on May 15, 2011. The exhibit is a May 15, 2011 letter in which appellants stated they were rescinding, cancelling, and revoking all contracts, agreements, releases, settlements, and transactions regarding their property or any construction work "that we may have entered into with Doherty Construction + Doyle Development, or Doherty Construction, or Patrick Dohery [*sic*], or John (aka) Doyle or Doyle Development, pursuant to the provisions of Civil Code [sections] 1689.6, 1689.10, 1689.21 under [Business and Professions Code section] 7159, as you never provided us Notice of our Right to Cancel as required by laws and as required by and in violation of [Business and Professions Code section] 7159 et seq. and law." They demanded return of all payments as well.

In their opposition memorandum, appellants made several legal arguments why the court should deny respondents' motion. These included that the settlement agreement did not release appellants' claims because it was induced by fraudulent misrepresentations of licensure and economic duress; both the 2007 construction contract and the settlement agreement were illegal and unenforceable contracts because of the lack of required licensure and could be rescinded at any time; appellants were entitled to, and had, canceled and rescinded the settlement agreement under the law regarding home installation and home improvement contracts; and the settlement agreement released known claims only.

The Trial Court's Grant of Summary Judgment and Award of Attorneys' Fees

After hearing argument, the trial court granted respondents' motion for summary judgment on several grounds. First, it ruled that the first, second, and ninth causes of action were expressly prohibited by the settlement agreement. The court found that the agreement released "all claims that 'in any manner arise from or relate to the facts and events described above,' " and that the parties accepted and assumed the risk that the facts in respect to which the agreement was given could be different from what was then known or believed to be true, and agreed that the agreement was not subject to termination or rescission on account of such differences in fact.

Second, the court concluded that appellants' rescission argument was unconvincing. The court found that "[n]either John Doyle nor Doyle Development was ever licensed as a contractor at any relevant time." It nonetheless concluded that "[i]nformation regarding licensing of the [respondents] is a matter of public record which was information easily obtainable by [appellants] at the time the settlement was entered into."

Third, the court concluded appellants' third cause of action alleged a breach of a contract to which respondents were not a party.

The court entered judgment in favor of respondents. The court subsequently granted respondents' motion for attorneys' fees as the prevailing parties pursuant to the terms of the settlement agreement, which motion appellants opposed.

The court granted respondents $30,462.75 in attorneys' fees and issued an amended judgment reflecting this award. Appellants filed a timely notice of appeal.

DISCUSSION

Both sides present numerous arguments and contentions for their point of view. We conclude it is unnecessary to address much of their debate. We reverse most of the trial court's ruling because it erred in concluding that appellants' first, second, and ninth causes of action were prohibited by the terms of the settlement agreement. The agreement released "known claims" only, and there are triable issues of material fact regarding whether appellants knew of the claims alleged in their first, second, and ninth causes of action when they entered into the settlement agreement. Furthermore, respondents failed below, and fail here, to establish a legal basis for the argument that appellants should be charged with knowledge of the undisputed lack of licensure. However, we conclude appellants do not establish that the trial court erred in ruling that appellants' third cause of action could

not be maintained. Therefore, we affirm that portion of the judgment.

I. *Standard of Review*

***7** A trial court properly grants summary judgment if the record establishes no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A party moving for summary judgment "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted (*Aguilar*).) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.,* fn.omitted.) "A defendant bears the burden of persuasion that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto. [Citation.]" (*Ibid.*)

Generally, "the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact.... A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]" (*Aguilar, supra,* 25 Cal.4th at pp. 850–851.) Although the burden of production shifts, the moving party always bears the burden of persuasion. (*Id.* at p. 850.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid*.) "Under the standard enunciated in *Aguilar, ...* at pages 850–851, the defendant must make an affirmative showing that the plaintiff will be unable to prove its case by any means." (*Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1439.)

The standard of review for an order granting or denying summary judgment is de novo. (*Aguilar, supra,* 25 Cal.4th at p. 860.) We are not bound by the trial court's stated reasons for granting summary relief, as we review the trial court's ruling, not its rationale. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.) In determining whether the parties have met their respective burdens, we consider "all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We view the evidence in the light most favorable to plaintiffs as the parties opposing summary judgment, strictly scrutinizing defendants' evidence in order to resolve any evidentiary doubts or ambiguities in plaintiffs' favor. (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64.)

II. *Appellants' Causes of Action Regarding Lack of Licensure*

Appellants first, second, and ninth causes of action each are based in a claim about lack of licensure. Appellants' first cause of action is for rescission of the 2007 construction contract and restitution of payments made to respondents because of a lack of statutorily required joint venture license; the second cause of action is for restitution of payments made for work done without proper licenses by "subcontractors and other persons who were not properly licensed ... with the required specialty or other license to perform work on the [property]"; and the ninth cause of action is for revocation pursuant to section 7106 of any contractor's licenses held by respondents, among others, because of violations of statutory licensure requirements.

A. *Licensure of Contractors*

***8** The Contractors' State License Law (CSLL), Business and Professions Code section 7000 et seq., governs the licensing requirements for persons acting as contractors and the consequences for noncompliance. Under the governing chapter, a "person" is "an individual, a firm, partnership, corporation, limited liability company, association or other organization, or any combination thereof." (§ 7025, subd. (b).) A "contractor" is in relevant part "any person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building ... or other structure, project, development or improvement, or to do any part thereof," and includes a subcontractor or specialty contractor. (§ 7026.)

Individuals acting as contractors must be licensed. "It is a misdemeanor for a person to engage in the business or act in the capacity of a contractor within this state without having a license therefor," unless particularly exempted from the relevant statutory requirements. (§ 7028, subd. (a).)

Furthermore, as appellants point out, when two licensed contractors are jointly awarded a contract, they must obtain a separate "joint venture license." Subject to an exception that does not apply here, "it is unlawful for any two or more licensees, each of whom has been issued a license to act separately in the capacity of a contractor within this state, to be awarded a contract jointly or otherwise act as a contractor without first having secured a joint venture license in accordance with the provisions of this chapter." (§ 7029.1, subd. (a).) A "joint venture license" is "a license issued to any combination of individuals, corporations, limited liability companies, partnerships, or other joint ventures, each of which holds a current, active license in good standing." (§ 7029.)

Furthermore, the fact, undisputed between the parties, that neither Doyle nor Doyle Construction was licensed does not excuse respondents from the reach of this joint venture license requirement. As appellants also point out, in *Lewis & Queen v. N.M. Ball Sons* (1957) 48 Cal.2d 141 (*Lewis & Queen*), our Supreme Court considered whether a partnership that acted as a subcontractor could proceed with an action for compensation when neither the partnership nor one of its partners, Queen, held a license, even though the other partner, Lewis, did hold an individual license. (*Id.* at p. 146.) The court rejected the argument that the partnership was in substantial compliance with licensing requirements because of the individual license. The court determined, "The 'person' that did the contracting work, and was required ... to have a license, however, was the partnership ..., and it had no license. Nor did Queen individually. *Section 7029, furthermore, expressly requires individual licensees who engage jointly in the contracting business to obtain an additional, joint license.*" (*Lewis & Queen,* at p. 149, italics added.)

The relevant statutory consequences for a person acting as an unlicensed contractor are contained in section 7031, and are severe, providing those contracting with such a person with both a powerful shield and sword. "To protect the public, the [CSLL] [citation] imposes strict and harsh penalties for a contractor's failure to maintain proper licensure. Among other things, the CSLL states a general rule that, regardless of the merits of the claim, a contractor may not maintain any action, legal or equitable, to recover compensation for 'the performance of any act or contract' unless he or she was duly licensed '*at all times* during the performance of that *act or contract*.' " (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 418, fn. omitted.) "This has been referred to as the 'shield' of the [CSLL]." (*Loranger v. Jones* (2010) 184 Cal.App.4th 847, 854.)[2]

***9** "The CSLL also contains a 'sword' in subdivision (b) of section 7031. [Citation.] Section 7031, subdivision (b), authorizes a person who utilizes the services of an unlicensed contractor to bring an action to recover *all* compensation paid to the contractor for his/her work." (*Loranger v. Jones, supra,* 184 Cal.App.4th at p. 854.)[3]

B. ***Appellants' First Cause of Action***

Appellants argue that the trial court erred in granting summary judgment regarding their first cause of action, which was based on allegations that there was not a required joint venture license for DC + DD, because the undisputed facts and certain admissions by respondents established their liability. We agree to this extent: respondents have not met their burden of establishing that there are no triable issues of material fact regarding the lack of a joint venture license. Therefore, reversal is necessary regarding this cause of action.

1. ***Evidence That a Joint Venture License Was Required***

Appellants contend that, as reflected by documents such as the 2007 construction contract, a partnership or joint venture was formed between Doherty and Doyle or their companies, Doherty Construction and Doyle Development, to engage in construction work on appellants' property. Appellants refer to this partnership or joint venture in different ways, including "DC + DD." Appellants argue that this entity was required to hold a separate contractor's license.

Respondents contend that appellants' argument lacks merit because no such partnership or joint venture as DC + DD existed or contracted with appellants. Below, they relied on Doherty's declaration statement that " 'Doherty Construction + Doyle Development' is not a separate company or entity, nor does it actually exist in any other sense."

Respondents' contention that DC + DD did not exist in any formal sense misses the point. It is not necessary for appellants to establish the formal creation of DC + DD

in order to seek restitution pursuant to the CSLL from respondents. Rather, appellants only need to prove that Doherty and Doyle, or their companies, were "awarded a contract jointly" (§ 7029.1) in order to raise a triable issue of material fact regarding whether a separate, joint venture license was required for respondents' work on the property.[4]

A number of documents establish such a triable issue of material fact. The 2007 construction contract, signed by Doherty, displays a letterhead with "Doherty Construction" on one side and "Doyle Development" on the other, with a "+" between them, identifies Doherty Construction and Doyle Construction as "the Contractors," and discusses their duties, responsibilities, and fees throughout without distinguishing between the two. The mechanic's lien complaint, verified by Doherty, refers to "plaintiffs" Doherty Construction and Doyle Development as licensed contractors that agreed to perform construction work on plaintiffs' property and were due money as a result of their construction work, again without distinguishing between the two. The settlement agreement, executed by Doherty, defines Doherty Construction and Doyle Development as "Doherty," refers to Doherty as a "fully licensed contractor," singular, and states as a fact that "Doherty" "entered into an agreement for certain construction work to be performed by Doherty on the [p]roperty."

***10** Jane's declaration further establishes this triable issue of fact. Among other things, she declared that Doyle and Doherty said they were partners who would be doing the work together, both worked on the project, and, after the execution of the settlement agreement, an additional $91,000 was paid to "Messrs. Doherty and Doyle ... for their past and future construction work." She also referred to two checks made out to "Doherty Construction" totaling $82,400, which appear from the signature to have been endorsed by Doyle.

In addition, as appellants also correctly point out, "[a] joint venture has been defined as an undertaking by two or more persons jointly to carry out a single business enterprise for profit with its existence dependent upon the intention of the parties as shown by an express agreement or by inference from their acts and conduct.... In the case of third parties the fundamental question is what had those parties the right to believe from the language of any contract and from the conduct of the parties to it as affecting them, and not as affecting each other." (*Foote v. Posey* (1958) 164 Cal.App.2d 210, 216.) Under this standard, there are triable issues of material fact, as indicated by the evidence that we have discussed.

Respondents do not directly address whether section 7031, subdivision (b) applies to the present circumstances. Indeed, their respondents' brief does not cite this code section. However, they do make a variety of arguments why we should affirm the trial court's judgment regarding appellants' lack of licensure claims, which we now review.

2. *The Settlement Agreement's Release of "Known Claims"*

Respondents argue that, as the trial court concluded, the release contained in the settlement agreement provides a complete defense to appellant's claims. We disagree, if only because the release language and the disputed circumstances surrounding the agreement raise triable issues of material fact about whether appellants released their claims about licensure.

Specifically, as appellants point out, the settlement agreement's release refers to "known claims" related to the facts and events described in the agreement, thereby indicating its scope was limited to what appellants knew when they entered into the agreement. The release provision states in full:

"The parties, and each of them, hereby release and forever discharge each other, their assigns and transferees, their agents, representatives, employees, officers, directors, attorneys, insurance carriers, successors, and each of them, from any and all claims, debts, liabilities, demands, obligations, costs, attorney's fees, expenses, actions, and causes of action, of every nature, character, and description, *which are known,* which the parties now own or hold, or have at any time heretofore owned or held, or may at any time thereafter own or hold, against each other, or their agents, representatives, employees, officers, directors, attorneys, insurance carriers, successors or assigns, or any of them which in any manner arise from or relate only to the facts and events described above." (Italics added.)

Respondents argue this reference to "known claims" is not fatal to their argument for several reasons. First, they contend that appellants have "failed to develop" the argument and, therefore, have waived it. We disagree. Appellants extensively argued below, and do so again on appeal, that respondents fraudulently induced them into entering into the settlement agreement by misrepresenting their licensing

status. These arguments included discussion of appellants' contentions about the lack of licensure and their ignorance of the facts, and were then followed by appellants' "known claims" contention. We conclude this was sufficient to avoid waiver.

***11** Respondents also contend that appellants' complaint "does not contain any unknown claims." They rely on statements made by appellants' legal counsel in a December 2007 letter to counsel for the named plaintiffs in the mechanic's lien action, Doherty Construction and Doyle Development, which letter was sent after the filing of the action and prior to the execution of the settlement agreement. Appellants' counsel stated that appellants, while their "position [was] more weighted towards seeking a reasonable resolution," were considering whether to file a cross complaint for slander of title and breach of specific provisions of the Business and Professions Code. Regarding the 2007 construction contract, appellants' attorney wrote, "The agreement prepared by your clients is not in compliance in either form or required content as mandated by the California State License Board ..., the State agency which regulates such agreements between contractors and their clients."

Respondents do not argue that these statements by appellants' counsel establish actual knowledge that appellants or their counsel knew about a lack of licensure. The statements are too vague to establish such knowledge, particularly when we view them, as we must, in the light most favorable to appellants as the parties opposing summary judgment, strictly scrutinizing it in order to resolve any evidentiary doubts or ambiguities in appellants' favor. (*Johnson v. American Standard, Inc., supra,* 43 Cal.4th at p. 64.) Furthermore, Jane raised triable issues of material fact about appellants' knowledge when she stated in her declaration that "[n]either my spouse and I nor our attorney investigated whether Doherty Construction & Doyle Development held a valid contractor's license, as we relied on their statements and that of their attorney that they were licensed," and that "[w]e did not understand until consulting with our attorney George Wolff a few months ago that the contractor Doherty Construction and/+ Doyle Development was required to but did not hold a contractor['s] license in California."

Instead, respondents argue we should conclude appellants' present claims were not unknown because, as appellants' counsel's December 2007 letter indicates, they were contemplating cross-complaining against the mechanic's lien complaint and, under the compulsory cross-complaint rule, would have had to assert all claims arising out of the disputed transactions or occurrences alleged in the complaint. (See *Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012) 206 Cal.App.4th 515, 538.) Therefore, respondents argue, we should construe the release as contemplating the claims appellants now bring. This convoluted argument is unpersuasive, if only because appellants entered into the settlement agreement rather than litigate the complaint, and did not file a cross-complaint, or an answer. Respondents cite no law establishing that under those circumstances, appellants' claims regarding licensure were somehow covered by the release.

Respondents also argue that, since, for the purposes of accrual of a cause of action, a plaintiff "discovers" a cause of action when he or she "at least suspects a factual basis ... for its elements, even if [s]he lacks knowledge thereof," (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397), appellants' December 2007 letter establishes that they "knew" they had claims against Doherty. This is also unpersuasive. Respondents fail to establish that the legal standard for accrual of an action is relevant to whether the lack of licensure was a "known claim" under the terms of the release. In any event, respondents do not establish that the letter showed that appellants had reason to suspect a lack of licensure. Also, the statement in the settlement agreement that "Doherty" was a licensed contractor and Jane's declaration statements regarding licensure raise triable issues of material fact on the question.

Respondents further argue that the letter is extrinsic evidence showing a mutual intent of the contracting parties to settle "the issue of whether Doherty had a right to keep certain money (and recover other money)." Assuming this is correct, it too has nothing to do with the determination of whether the lack of licensure was a "known claim" that was released by the settlement agreement.

***12** Also, in response to appellants' argument that the settlement agreement does not apply because they were fraudulently induced into entering into it, respondents argue that appellants were responsible for obtaining information about lack of licensure because it was easily obtainable and public. Given that we do not decide the fraud issue,[5] we do not need to further address this argument.

However, in its order granting summary judgment, the trial court made a similar finding based on *Carroll v. Dungey*

(1963) 223 Cal.App.2d 247 (*Carroll*), and the scope of this finding is unclear. We note that *Carroll* merely determined that a party, *as the result of his independent investigation* of annual reports filed by a company with the Public Utilities Commission, "became charged with knowledge of whatever facts were revealed by the reports...." (*Id.* at p. 255.) Here, there is no evidence appellants conducted any independent investigation regarding licensure. To the contrary, Jane stated in her declaration that appellants simply relied on the representations made to them by their contractors and their attorney about licensure. Therefore, *Carroll* is inapposite, and does not support the conclusion that lack of licensure should be construed to be a "known claim."

Finally, respondents declare that the licensing laws were not intended to protect consumers who negotiate contracts through attorneys to end litigation. They do not provide legal authority for this proposition and, therefore, we disregard it. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [an appellate court may treat as waived and disregard legal arguments unsupported by citation to legal authorities].)

3. *The Interpretation of the Settlement Agreement*

Respondents argue that the "initial question" on appeal is whether the settlement agreement is enforceable, and point out that "[a] contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if that can be done without violating the intention of the parties." (*Barham v. Barham* (1949) 33 Cal.2d 416, 422.) Respondents further contend that the part of the settlement agreement that settled the mechanic's lien action "is conceptually separate from that part of the agreement requiring certain limited additional work," and should be found to be valid. This argument, however, is unpersuasive because we do not need to decide on the validity of the settlement agreement, given our view that there are triable issues of material fact regarding whether appellants released the claim contained in their first cause of action.

Next, respondents, while recognizing "that work that must meet certain licensing standards is not exempt simply because that work is a condition of settlement," contend that the portion of the settlement agreement addressing work going forward is subject to summary adjudication because appellants' complaint does not plead claims for restitution of postsettlement work by respondents, and the postsettlement work was not subject to licensing requirements, among other things. Again, we disagree. Appellants do not reference the settlement agreement in their complaint, but the amount of restitution they seek appears to be for both pre-and postsettlement work. The complaint seeks restitution of $306,900 from respondents. The 2007 construction contract states the sum to be paid to the contractors as $298,525. The letter from appellants' counsel sent on December 6, 2007, shortly before the execution of the settlement agreement on December 15, 2007, states that appellants had paid Doherty Construction and Doyle Development $216,000.

***13** Furthermore, the settlement agreement itself repeatedly refers to future work that is to be performed pursuant to the 2007 construction contract. For example, it states, "Doherty shall promptly complete the remaining work provided for under the [2007 construction contract] that consists of final framing and inspection and approval by the San Francisco Building Department."

Finally, even assuming for the sake of argument that, as respondents contend, the postsettlement work was subject to a separate contract from the 2007 construction contract, respondents fail to establish that there are no triable issues of material fact regarding whether it would also be subject to the same statutory licensure requirements as the 2007 construction contract. Respondents contend the settlement agreement's use of the singular "Doherty" is ambiguous and may have been an "expedient reference" (apparently to Patrick Doherty dba Doherty Construction), rather than evidence of a joint venture. We disagree. The plain language of the settlement agreement defines "DOHERTY CONSTRUCTION and DOYLE DEVELOPMENT" as "Doherty."

Respondents also point out the mechanic's lien action referred to plaintiffs as plural, and Doherty Construction and Doyle Development separately as contractors and builders. Furthermore, they contend, "nothing in the record indicates that Doyle's participation was actually necessary to complete this work, under rules of contract interpretation, for purposes of determining who does the work, it would be proper (and necessary) to interpret 'Doherty' in paragraph 4 [of the settlement agreement] to refer to Patrick Doherty dba Doherty Construction." However, respondents fail to explain why this is relevant in light of the plain language of the relevant Business and Professions Code provisions that we have discussed, which does not limit their application to those contracting parties who actually perform the work. Given the stated definition of "Doherty" as "DOHERTY CONSTRUCTION and DOYLE DEVELOPMENT" in the settlement agreement, we see no reason to conclude this

term could only be referring to Doherty as an individual, as respondents argue.

4. ***Paragraph 14 of the Settlement Agreement***

Respondents also discuss paragraph 14 of the settlement agreement at some length in their respondent's brief, which paragraph deals with the parties' factual assumptions when they entered into the agreement. The trial court quoted from it in granting respondents' motion for summary judgment. Paragraph 14 states:

"The parties hereby acknowledge that the facts in respect of which this Settlement Agreement and Mutual General Release is given may hereafter turn out to be other than or different from the facts in that connection now known or believed by them to be true, and the parties expressly accept and assume the risk of the facts turning out to be different than agreed, and this Settlement Agreement and Mutual General Release shall in all respects be effective and not subject to termination or rescission on account of any such differences in fact."

Respondents cannot assert paragraph 14 to evade responsibility for its violation of CSLL's licensing provisions.[6] Civil Code section 1668, cited by appellants regarding its anti-fraud provision, *also* prohibits the reliance on a contract to exempt someone for responsibility from violating the law, which in this case would be a violation of CSLL's licensing provisions. Civil Code section 1668 states in its entirety:

***14** "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or *violation of law,* whether willful or negligent, are against the policy of the law." (Civ.Code, § 1668, italics added.)

Thus, respondents cannot rely on paragraph 14 as a defense against respondents' claim pursuant to section 7031, subdivision (b). (See, e.g., *Blankenheim v. E.F. Hutton & Co.* (1990) 217 Cal.App.3d 1463, 1471–1472["[u]nder this section, a party may not contract away liability for fraudulent or intentional acts *or for negligent violations of statutory law* " (italics added)].)

C. ***Appellants' Second Cause of Action***

Appellants argue that the trial court also erred in granting summary judgment regarding their second cause of action, which was based on allegations that respondents used subcontractors on the project that did not have proper subcontractor licenses. We agree to this extent: the trial court's summary judgment regarding this cause of action was based entirely on the settlement agreement and, although it is not clear, possibly on the publicly available information regarding licensure of respondents and the Doyle defendants, which we have already discussed, were not proper bases for summary judgment or summary adjudication. Therefore, reversal is necessary regarding this cause of action as well.

We note that in the trial court below, respondents also moved for summary adjudication regarding the second cause of action on another ground, that being that there was no evidence that they used unlicensed subcontractors on the project. However, the trial court did not rule on this issue and respondents do not raise it here. Therefore, we do not further address this question.

D. ***Appellants' Ninth Cause of Action***

Appellants also argue that the trial court erred in granting summary judgment regarding their ninth cause of action, which sought revocation pursuant to section 7106 of any licenses held by respondents, among others, for certain violations of the CSLL.

Appellants correctly argue that the court's ruling regarding the ninth cause of action was in error because the settlement agreement did not relieve respondents of unknown claims, including those regarding lack of licensure.

Respondents reply that, since the statutory authority to suspend or revoke such licenses is discretionary, so is the authority of the trial court. (See §§ 7090, 7106.) They further contend that "even on summary judgment, the standard of review for the court's resolution of this count is abuse of discretion," which they claim did not occur.

Respondents' argument is unpersuasive because the trial court did not actually rule as their argument suggests. There was no exercise of discretion to determine whether or not to suspend or revoke any license. Instead, the court stated as the only reason for its grant of summary judgment regarding the ninth cause of action that appellants were "attempting to do what is expressly prohibited under the settlement agreement." As we have discussed, this is not a proper basis for the court's ruling, requiring reversal of the court's ruling regarding the ninth cause of action as well.

II. ***Appellants' Third Cause of Action***

***15** Appellants also argue that the trial court erred in granting summary judgment regarding their third cause of action, for breach of contract. We disagree, and affirm this part of the trial court's judgment.

As we have discussed, in their third cause of action, appellants alleged several specific breaches of the "Creative Contract," a reference to an alleged 2008 construction contract appellants entered into with defendants *other* than respondents and the Doyle defendants. Appellants further alleged that "[a]s a direct and proximate result of the breaches of the DC + DD CONTRACT," Doherty and DC + DD, among others, which breaches are *not* identified, appellants had suffered $500,000 in damages.

Appellants apparently referred to the wrong contract in their allegations of breach in this cause of action. Respondents asserted as undisputed facts that they did not sign any agreements with any of the individuals related to the "Creative Contract," which appellants did not dispute. The trial court ruled that as to this cause of action, appellants "were not parties to the contract referenced in that cause of action. Because the pleadings must determine the scope of relevant issues on a motion for summary judgment, the court cannot consider [appellants'] counsel's plea of 'oversight' or 'mistake.' (*Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 73.)"

On appeal, appellants do not directly challenge the legal basis for the court's ruling. Instead, they contend that, since they incorporated by reference into their third cause of action allegations that they had entered into the 2007 construction contract, the trial court erred in its ruling because it was required to consider all possible theories of liability. This argument is unpersuasive because, while these allegations may have been incorporated, they do not include allegations of of *breaches* of the 2007 construction contract. The only breaches alleged in the third cause of action were regarding the Creative Contract. The trial court correctly found there was undisputed evidence that respondents were not a party to that contract. Therefore, this portion of the trial court's ruling is affirmed.

III. ***The Attorneys' Fees Award***

Given our conclusion that we must reverse the trial court's rulings regarding appellants' first, second, and ninth causes of action, we also reverse the trial court's award of attorneys' fees to respondents because it is premature to determine who is the prevailing party in the action. We do not further address the parties' arguments regarding the court's award.

IV. ***Issues We Do Not Further Address***

The parties debate a number of other issues that we need not further address in light of our conclusion that there are triable issues of material fact regarding appellants' lack of licensure claims. These include whether there were triable issues of material fact regarding whether appellants were fraudulently induced into the settlement agreement; whether appellants timely cancelled or rescinded the settlement agreement; whether the settlement agreement was procured by economic duress; whether the settlement agreement constituted a home improvement contract or home installation contract subject to certain statutory notice provisions; whether respondents made judicial admissions proving there was a DC + DD joint venture; whether respondents are estopped from denying the existence of this joint venture; whether the deposition testimony of Doyle, submitted by appellants shortly before the summary judgment hearing, had any significance; and whether the trial court should have continued the summary judgment hearing to allow appellants to obtain a certified transcript of that deposition.

DISPOSITION

***16** The trial court's judgment is reversed and this matter remanded for further proceedings consistent with this opinion, with the instruction to the trial court to grant summary adjudication regarding appellants' third cause of action. (*Paterson v. City of Los Angeles* (2009) 174 Cal.App.4th 1393, 1397 [reversing summary judgment and ordering the trial court to grant summary adjudication].) Appellants are awarded costs of appeal.

We concur:

Kline, P.J.

Richman, J.

All Citations

Not Reported in Cal.Rptr., 2012 WL 5985634

Footnotes

1 All further unspecified code references refer to the Business and Professions Code unless otherwise indicated.

2 Subject to irrelevant exceptions, section 7031, subdivision (a) states that "no person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract where a license is required by this chapter without alleging that he or she was a duly licensed contractor at all times during the performance of that act or contract, regardless of the merits of the cause of action brought by the person ...." (§ 7031, subd. (a).)

Section 7031, subdivision (a) also states that its prohibition "shall not apply to contractors who are each individually licensed under this chapter but who fail to comply with Section 7029," the joint venture licensing provision. (§ 7031, subd. (a).) Respondents do not rely on this exception. In any event, in light of the existence of a triable issue of material fact regarding whether Doyle or Doyle Development acted as an unlicensed contractor in the present case, this provision would not apply here because its application is premised on the proper licensure of "each" contractor involved in the joint venture. It is undisputed that neither Doyle nor Doyle Development was licensed.

3 Section 7031, subdivision (b) states in relevant part, also subject to exceptions that do not apply here, that "a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract." (§ 7031, subd. (b).)

4 We note, without determining its legal significance, that while respondents argue that DC + DD does not exist, DC + DD not only made a general appearance in the action below (and denied its existence), but also was among the respondents who moved successfully for an award of more than $30,000 of attorneys' fees.

5 The parties extensively debate whether or not the release is effective in light of appellants' contention that they were fraudulently induced into entering into the settlement agreement based on misrepresentations about licensure, such as the statement in the settlement agreement that "Doherty," defined in the agreement as "DOHERTY CONSTRUCTION and DOYLE DEVELOPMENT," "is a fully licensed contractor doing business in the State of California." We do not further address this issue because of our conclusion that there are triable issues of material fact regarding the lack of licensure and the statutory remedies available to appellants as a consequence.

6 The parties debate the significance of paragraph 14 regarding whether or not appellants were fraudulently induced into entering into the settlement agreement because of misrepresentations about licensure. We do not further address this issue either because of our conclusion that there are triable issues of material fact regarding the lack of licensure and the statutory remedies available to appellants as a consequence.